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# In the Supreme Court of the United States

OCTOBER TERM, 1993

IVAN C. REEDER, PETITIONER

*v.*

MARVIN T. RUNYON, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court erred in granting summary judgment against petitioner on the ground that his speech impairment did not qualify him as an "individual with a disability" within the meaning of the the Rehabilitation Act, 29 U.S.C. 706(8)(B), as amended.

2. Whether the district court erred in holding that petitioner did not have a cause of action against the Postal Service under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported, but the judgment is noted at 986 F.2d 1428 (Table). The opinion of the district court (Pet. App. 1b-26b) is reported at 813 F. Supp. 773.

### JURISDICTION

The judgment of the court of appeals was entered on February 9, 1993. The petition for a writ of certiorari was filed on May 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Ivan C. Reeder, who became an employee of the United States Postal Service in 1973, suffers from a speech impairment that is "probably most accurately labelled or classified as vocal hyperfunction or dysphonia." Pet. App. 2b & n.2. During his tenure as a Postal Service employee, petitioner received several promotions and advanced to a management position having supervisory responsibilities. *Id.* at 3b, 16b n.11. In April 1989, petitioner applied for a promotion to the position of Maintenance Programs Specialist, but the position was awarded to another employee. In June 1990, petitioner again applied for the same position, but he received notice in August 1990 that his application was denied. *Id.* at 4b.

2. Petitioner filed this action on June 11, 1990, alleging that the Postal Service's denial of his first promotion application violated Sections 501[1] and 504[2] of the Reha-

[1] Section 501(b), 29 U.S.C. 791(b), as amended, provides:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission [i.e., the Equal Employment Opportunity Commission] and to the Committee [i.e., the Intragency Committee on Employees who are Individuals with Disabilities] an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

bilitation Act, 29 U.S.C. 791, 794. He amended his complaint in June 1991 to assert the same causes of action with regard to his second application for advancement.[3] Pet. App. 4b-5b.

The district court granted summary judgment against petitioner on all claims. The court stated that, under the Tenth Circuit's decision in *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477-1478 (1988), cert. denied, 493 U.S. 811 (1989), only Section 501 of the Act—and not Section 504—provides federal employees with a cause of action for violations of the Rehabilitation Act. See Pet. App. 9b-10b.

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In 1992 amendments to this and other sections of the Rehabilitation Act, Congress replaced the terms "a handicap" and "handicaps" with "disability" and "disabilities." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, Tit. I, §§ 102(f)(2) and (p)(29), 106 Stat. 4348, 4360. Except when referring to the findings of the courts below, which applied the unamended statute, this brief will employ the Act's amended language.

[2] Section 504(a), 29 U.S.C. 794(a), as amended (see § 102(p)(32), 106 Stat. 4360), provides in part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

[3] In addition, petitioner alleged violations of the Postal Reorganization Act, 39 U.S.C. 1001(b), 1003(b), and claimed that the Service breached his employment contract and its implied covenant of good faith and fair dealing. *Reeder* v. *Frank*, 813 F. Supp. 773, 775 (D. Utah 1992). The district court granted summary judgment to the Postal Service on those claims, and petitioner did not pursue them in the court of appeals.

Turning to petitioner's Section 501 claim, the court held that petitioner was not entitled to relief under the Rehabilitation Act because he had failed to establish that he was an "individual with handicaps" under former 29 U.S.C. 706(8)(B).[4] Pet. App. 11b-25b. The court explained that, although petitioner's speech impairment was regarded as affecting a "major life activity," *id.* at 15b-17b & n.10, citing 29 C.F.R. 1613.702(c) (1991) (referring to, *inter alia*, "talking" and "working"), the evidence did not demonstrate that the limits on such activities were "substantial." See 29 U.S.C. 706(8)(B)(i). Petitioner had demonstrated his ability to speak intelligibly, and nothing in the record suggested that his impairment had adversely affected, or would adversely affect, his career advancement within the Postal Service. Pet. App. 16b n.11. The court also held that petitioner had failed to show that he had a "record" of an im-pairment that substantially limited one or more of his major life activities. See 29 U.S.C. 706(8)(B)(ii). Petitioner admitted that he had not consulted a physician since 1984 regarding his impairment, and his medical records did not show that he had ever been treated for it. Pet. App. 18b-20b. Finally, the court held that petitioner is not "regarded" as having a handicap, see 29 U.S.C. 706(8)(B)(iii). Pet. App. 20b. It noted that petitioner had never previously identified himself as suffering from a speech disorder. *Id.* at 17b-18b. Although petitioner had been denied a brief tele-communications assignment in 1989, in minor part be-cause of his difficulties in communicating, *id.* at 20b-21b, the court noted that this did not

[4] Subject to conditions not applicable here, an "individual with a disability" (formerly an "individual with handicaps") is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B).

suggest that he would be precluded from continuing or advancing in his normal course of employment. *Id.* at 23b; see also *id.* at 23b-25b.

3. The court of appeals affirmed in a brief unpublished opinion. Pet. App. 1a-3a. The court of appeals agreed, for substantially the reasons relied upon by the district court, that petitioner did not qualify as a handicapped person under the Rehabilitation Act, and thus lacked a viable cause of action under Section 501 of the Act. Pet. App. 3a. The court also declined petitioner's request that it reconsider circuit precedent holding that federal employees have no cause of action under Section 504. The court explained that, "because [petitioner's] [Section] 504 claim also requires an initial determination that [he] is handicapped," petitioner's contention that he has a claim under Section 504 is "moot." Pet. App. 3a.

## ARGUMENT

Petitioner raises two issues, neither of which merits this Court's review. First, he claims that the courts below erred in finding that he did not qualify as a person with a disability under the Rehabilitation Act. That fact-bound issue was correctly resolved by the district court and court of appeals. Second, although the courts of appeals are divided on the question whether employees may sue federal agencies for violations of Section 504 of the Rehabilitation Act, there is no reason for the Court to resolve that conflict here. The issue is of little practical significance and, in any event, its resolution would not affect the outcome of this case.

1. There is no merit to petitioner's claim that the courts below erred in concluding that petitioner did not qualify as an "individual with a disability" (or, under the prior version of the Act, an "individual with handicaps") for purposes of the Rehabilitation Act. The Act defines a person with a disability as one who has "a physical * * *

impairment which substantially limits one or more of [his] major life activities," has a "record of such an impairment," or "is regarded as having such an impairment." 29 U.S.C. 706(8)(B). See note 4, *supra*. In support of his claim that he meets one or more of those criteria, petitioner cites his own deposition testimony, medical records, an affidavit of his supervisor, and "[i]nferences from the record" that, in his view, suggest that his speech impairment is the explanation for the Postal Service's failure to promote him. Pet. 40-43.

The district court fully considered petitioner's allegations and concluded that he failed to aver the specific facts needed to withstand a motion for summary judgment. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 888 (1990). With respect to whether petitioner's disability "substantially" limits any of his major life activities, the district court assessed petitioner's impairment in light of his apparent ability to communicate in his present position and in the course of these legal proceedings. See Pet. App. 16b n.11, 17b. The court also observed that petitioner's physician denied treating him for a speech impairment, and that his medical records stated only that his larynx problems were "associated with some difficulty in speech." *Id.* at 19b-20b. Moreover, although petitioner's supervisor acknowledged that his impairment was a "minor factor" in the decision to deny him a 30-day telecommunications detail involving intensive use of the telephone, *id.* at 20b-21b, petitioner failed to allege any relation between that detail and the duties of the position to which he sought to be promoted, see *id.* at 23b-24b. The court thus concluded that the record failed to show that petitioner was "likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment," so as to be considered "substantially limited" in a major life activity. See 29 C.F.R. 32.3.

Because the district court correctly determined that there was not sufficient evidence from which a jury could conclude that petitioner satisfied the criteria for a handicapped person, see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the court did not err in granting summary judgment against him. The court of appeals' affirmance of that ruling raises no issue of general importance warranting review by this Court.

2. Relying on its previous decision in *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989), the court of appeals rejected petitioner's contention that he was entitled to pursue a claim against the Postal Service under Section 504 of the Rehabilitation Act. Two other courts of appeals have agreed that Congress intended Section 501 to provide the exclusive remedy for federal employees under the Rehabilitation Act, and that federal employees may not sue under Section 504. See *Johnston* v. *Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1321 (7th Cir. 1984); see also *Milbert* v. *Koop*, 830 F.2d 354, 357 (D.C. Cir. 1987) ("strongly suggest[ing] that in the future, plaintiffs * * * seek relief under section 501 rather than under section 504"). Other courts of appeals, by contrast, have permitted federal employees to sue under Section 504. See *Doe* v. *Garrett*, 903 F.2d 1455, 1461 & n.10 (11th Cir. 1990); *Gardner* v. *Morris*, 752 F.2d 1271, 1277-1279 & n.7 (8th Cir. 1985); *Smith* v. *United States Postal Service*, 742 F.2d 257, 260-262 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d 292 (5th Cir. 1981); see also *Clark* v. *Skinner*, 937 F.2d 123, 125 (4th Cir. 1991).

The language and structure of the Rehabilitation Act's remedial provisions support the Tenth Circuit's conclusion that federal employees may not sue under Section 504 of the Act. In Section 505(a)(1), 29 U.S.C.

794a(a)(1), the Act provides the same remedies for violations of Section 501 that are available to federal employees under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c).[5] Since federal employees may sue the government under Section 717 of Title VII, they also may sue under Section 501 of the Rehabilitation Act. In contrast, the remedies for violations of Section 504 are specified in a separate provision of the Rehabilitation Act—Section 505(a)(2), 29 U.S.C. 794a(a)(2). Section 505(a)(2) states that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved" by any act of any "recipient of Federal assistance or Federal provider of such assistance" under Section 504.

In ordinary usage, the category of "recipient[s] of Federal assistance or Federal provider[s] of such assistance" does not encompass the Postmaster General's direct federal employment (or other) functions. Moreover, Title VI of the Civil Rights Act of 1964 does not afford a remedy for discrimination in programs administered directly by the federal government, rather

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[5] Section 505(a), 29 U.S.C. 794a(a) provides:

> (1) The remedies, procedures, and rights set forth in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) shall be available, with respect to any complaint under [Section 501], to any employee or applicant for employment aggrieved by the final disposition of such compliant, or by the failure to take final action on such complaint. * * *
>
> (2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [Section 504].

than through a state, local, or private intermediary. See *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) (Title VI applies only "where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary"), cert. denied, 466 U.S. 929 (1984). See also *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605-606 (1986). Finally, the view that Section 504 provides no independent cause of action for federal employees finds support in Congress's decision to create separate remedial provisions for Section 501 and Section 504 claims. As Judge Posner observed in *McGuinness*, 744 F.2d at 1321, "it is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501, would have done so again a few sections later in section 504." See also Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 Tex. L. Rev. 781, 785 n.18 (1989).

In any event, the question whether federal employees have a cause of action under Section 504 of the Rehabilitation Act as well as under Section 501 is of little practical significance, since there is no clear advantage to suing under Section 504.[6] Section 501 has

[6] Petitioner suggests (Pet. 65 n.10) that a Section 504 action would render him eligible for compensatory damages and a jury trial. However, with the exception of *Cortes* v. *Board of Governors*, 766 F. Supp. 623 (N.D. Ill. 1991), which did not discuss the defendant's status, none of the cases applying Section 504 to suits by an employee of the federal government has adopted those remedies. See also *Wood* v. *President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219 n.9 (11th Cir. 1992) (persons proceeding under Section 504 against the federal government for employ-

long been read to impose an affirmative-action requirement upon federal employers that Section 504 omits, see *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410-411 (1979), and both provisions were amended in 1992 to state identical standards for evaluating complaints alleging nonaffirmative-action employment discrimination. Compare 29 U.S.C. 791(g) with 29 U.S.C. 794(d).[7] Moreover, the courts that have permitted federal employees to sue under Section 504 have required employees to satisfy the same exhaustion requirements that are a prerequisite to suit under Section 501. See, *e.g.*, *Smith* v. *United States Postal Service*, 742 F.2d at 260-262; *Prewitt* v. *United States Postal Service*, 662 F.2d at 304.

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ment discrimination may not recover compensatory or punitive damages).

[7] Section 791(g) of 29 U.S.C., which was added in 1992 (see § 503, 106 Stat. 4424), provides:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

The 1992 version of 29 U.S.C. 794(d) (see § 506, 106 Stat. 4428), provides:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

In any event, this case is a particularly inappropriate vehicle for resolving the disagreement in the circuits concerning Section 504 claims, since a ruling in petitioner's favor on that issue would not alter the outcome. As the courts below correctly determined, petitioner is not eligible for relief under the Act because he does not qualify as an "individual with a disability." Thus, even if Section 504 provides a cause of action for federal employees, petitioner does not have a claim against the Postal Service because he does not come within the reach of the Act's substantive protections.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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